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IN THE

Supreme Court of the United States

October Term, 1964

No. 387

ROBERT BLOW and ELLEN MARIE DAVIS,

Petitioners,

v.

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional, Statutory and Regulatory Provisions Involved	3
Statement	4
How the Federal Questions Were Raised and Decided Below	6
Reasons for Granting the Writ	8
I. The State of North Carolina Has Encouraged and Enforced Racial Discrimination in Violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment	9
A. Administrative regulations issued by the State Board of Health regarding the segregation of bathroom facilities in restaurants involve the State in the discrimination practiced in these cases	9
B. These convictions enforce and encourage racial discrimination in violation of the Fourteenth Amendment to the Constitution of the United States	13

PAGE

II. The Civil Rights Act of 1964 Now Secures to Petitioners the Right to the Conduct Which the State Seeks to Punish; Therefore,

A. Under federal law, these prosecutions are abated 16

B. These cases, if not reversed outright, should be remanded to the Supreme Court of North Carolina for its determination of the abative effect of the federal Civil Rights Act of 1964 .. 22

CONCLUSION 25

APPENDIX:

Opinion of Supreme Court of N. C. in *State* v. *Ellen Marie Davis* 1a

Opinion of Supreme Court of North Carolina in *State* v. *Robert Blow* 7a

Judgment in *State* v. *Ellen Marie Davis* 9a

Judgment in *State* v. *Robert Blow* 10a

Certification of Record, *State of North Carolina* v. *Ellen Marie Davis* 11a

Certification of Record, *State* v. *Robert Blow* 12a

APPENDIX B:

Statutory and Regulatory Provisions 13a

Table of Cases

PAGE

Barr v. Columbia, —— U. S. ——, 12 L. Ed. 2d 766 13
Bell v. Maryland, —— U. S. ——, 12 L. Ed. 2d 822 ..... 13, 15, 18, 19, 20, 22, 23, 24, 25
Bouie v. City of Columbia, —— U. S. ——, 12 L. Ed. 2d 894 13
Burton v. Wilmington Parking Authority, 365 U. S. 715 12

Fay v. New York, 332 U. S. 261 15
Fox v. North Carolina, —— U. S. ——, 12 L. Ed. 2d 1032 ..... 2, 12

Gibbons v. Ogden, 22 U. S. (9 Wheaton) 1 (1824) 18
Griffin v. Maryland, —— U. S. ——, 12 L. Ed. 2d 754 13

Hamm v. Rock Hill, No. 2, Oct. Term 1964, cert. granted, —— U. S. ——, 12 L. Ed. 2d 1042 13
Hauenstein v. Lynham, 100 U. S. 483 22

Lupper v. Arkansas, No. 5, Oct. Term, 1964, cert. granted, —— U. S. ——, 12 L. Ed. 2d 1043 13

Robinson v. Florida, —— U. S. ——, 12 L. Ed. 2d 711 ..... 11, 12, 13

Shelley v. Kraemer, 334 U. S. 1 14
Sola Elec. Co. v. Jefferson Elec. Co., 317 U. S. 173 (1942) 18
Sperry v. Florida, 373 U. S. 379 (1963) 18
State v. Broadway, 157 N. C. 598, 72 S. E. 987 (1911) .. 25
State v. Cress, 4 Jones (49 N. C.) 421 (1857) 23
State v. Foster, 185 N. C. 674, 116 S. E. 561 (1923) 24
State v. Long, 78 N. C. 571 (1878) 23
State v. Massey, 103 N. C. 356, 9 S. E. 632 (1889) 23

PAGE

State v. Moon, 178 N. C. 715, 100 S. E. 614 (1919) 25
State v. Perkins, 141 N. C. 797, 53 S. E. 735 (1906) 25
State v. Putney, 61 N. C. 543 (1866-67) 25
State v. Williams, 97 N. C. 455, 2 S. E. 55 (1887) 23

Testa v. Katt, 330 U. S. 386 22
Trustee of Monroe Ave. Church of Christ v. Perkins, 334 U. S. 813 14
Turner v. Memphis, 369 U. S. 350 12

United States v. Chambers, 291 U. S. 217 (1934) 18
United States v. Tynen, 78 U. S. (11 Wall.) 88 (1871) 18

Williams v. North Carolina, —— U. S. ——, 12 L. Ed. 2d 1032 12

STATUTES

Civil Rights Act of 1964, §§201-203, 78 Stat. 243 244 ..... 3, 14, 16, 17, 18, 20, 21, 25, 13a

N. C. Gen. Stat. §12-2 (1953) 3, 23, 16a

N. C. Gen. Stat. §12-4 (1953) 3, 23, 16a

N. C. Gen. Stat. §14-134 (1953) 3, 4, 6, 16a

N. C. Gen. Stat. §72-1 (1963) 3, 7, 12, 16a

N. C. Gen. Stat. §72-46 (1953) 3, 9, 17a

N. C. Gen. Stat. §72-47 (1953) 3, 10, 18a

N. C. Gen. Stat. §72-48 (1953) 3, 11, 18a

N. C. Gen. Stat. §72-48.1 (1953) 3, 11, 18a

1 U. S. C. §109, 61 Stat. 635 ..... 3, 19, 15a

Other Authorities

PAGE

House Committee on Civil Rights Act, H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 21

Million, *Expiration or Repeal of a Federal or Oregon Statute as a Bar to Prosecution for Violation Thereunder*, 24 Ore. L. Rev. 25 (1944) 20

Report of North Carolina Committee to U. S. Commission on Civil Rights (1962), *Equal Protection of the Laws of North Carolina* 11

Test Form 451, revised 1958 of the North Carolina State Board Health Sanitary Engineering Division, *Law Rules and Regulations Governing Sanitation of Restaurants and Other Food Handling Establishments* 3, 20a

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No. .....

ROBERT BLOW and ELLEN MARIE DAVIS,

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—v.—

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of North Carolina entered in the above-entitled cases on March 18, 1964.

Citations to Opinions Below

The opinions of the Supreme Court of North Carolina are reported at 261 N. C. 463, 135 S. E. 2d 14 (1964), and 261 N. C. 467, 135 S. E. 2d 17 (1964) and are set forth in the appendix hereto, *infra*, pp. 1a, 7a.

Jurisdiction

The opinions and judgments of the Supreme Court of North Carolina were entered on March 18, 1964, *infra*, pp. 1a, 7a, 9a, 10a. On June 24, 1964, the Chief Justice

signed an order extending petitioners' time for filing petition for writ of certiorari to and including August 15, 1964.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, §1257(3), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented

1. Where petitioners, two Negroes, were convicted of trespass for refusing to leave the property of a North Carolina restaurateur and motel owner, who refused them service and demanded that they leave solely because of their race, were their Fourteenth Amendment rights to due process and equal protection violated, in that:

(A) The state has encouraged racial discrimination in restaurants by administrative regulation as in the case of *Fox* v. *North Carolina*, —— U. S. ——, 12 L. Ed. 2d 1032, and by laws denying Negroes rights guaranteed white persons at inns.

(B) The state enforces racial discrimination by arrest and prosecution; the discrimination has been caused at least in part, by a custom of segregation supported by state law; and the state subordinates petitioners' claims of equality in the public life of the community to a narrow property right.

2. In such a case, are the prosecutions abated by the passage of the Civil Rights Act of 1964 while these cases were pending:

(A) as a matter of federal law, or in the alternative,

(B) must they be remanded for a decision as to abatement under state law.

Constitutional, Statutory and Regulatory Provisions Involved

1. This case involves the following provisions of the Constitution of the United States:

Article 1, Section 8, Clause 3;

Article VI, paragraph 2;

The Fourteenth Amendment.

2. This case involves the following statutes of the United States.[1]

Civil Rights Act of 1964, §§201-203, 78 Stat. 243, 244;

1 U. S. C. §109, 61 Stat. 635.

3. This case involves the following North Carolina General Statutes.[2]

N. C. Gen. Stat. §12-2 (1953);

N. C. Gen. Stat. §12-4 (1953);

N. C. Gen. Stat. §14-134 (1953);

N. C. Gen. Stat. §72-1 (1953);

N. C. Gen. Stat. §72-46 (1953);

N. C. Gen. Stat. §72-47 (1953);

N. C. Gen. Stat. §72-48 (1953);

N. C. Gen. Stat. §72-48.1 (1953).

4. This case also involves test form 451, revised 1958, *Law Rules and Regulations Governing the Sanitation of*

[1] Set forth *infra* at pp. 13a-16a.

[2] Set forth *infra* at pp. 16a-19a.

Restaurants and Other Food Handling Establishments prepared by the North Carolina State Board of Health Sanitary Engineering Division.[3]

Statement

Petitioners, two Negroes, were arrested while engaging in a peaceful protest outside the Plantation Restaurant and Enfield Motel, Enfield, North Carolina after they had been denied entry into the restaurant. They were convicted of "trespass" in violation of North Carolina General Statutes §14-134, *infra* p. 16a.

The Plantation Restaurant and the adjoining Enfield Motel, located on interstate highway 301, are owned by the complaining witness, Mr. W. R. Davis (D. 15, 18, 19; B. 15, 16, 17).[4] He manages the restaurant and his wife the motel (B. 20). Both places are advertised together along the highway, on the radio, and in newspapers. The motel advertises the restaurant in its rooms, and guests from the motel eat at the restaurant. Mr. Davis does not indicate in any of these advertisements that the facilities do not serve Negroes (D. 19, 20; B. 17, 18).

Shortly before noon on August 7, 1963, petitioners, as part of a group of thirty-five, approached the restaurant at which they had been denied service the previous evening (D. 16, 17). Although he knew that they sought service (B. 21), Mr. Davis locked the restaurant upon petitioners' approach because of their color (D. 17; B. 21):

"The reason I locked the door was because the defendant was a Negro and I am white. The restaurant

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[3] Set forth *infra* at pp. 20a-22a.

[4] "D" refers to record in *Davis* v. *North Carolina*; "B" refers to record in *Blow* v. *North Carolina*.

> I operate serves white and not Negroes; that is the reason I locked the door" (D. 17).

Although Mr. Davis' property extended out to Highway 301, two "white only" signs (D. 18; B. 21) hanging inside the front doors were the only indication on the premises or on the advertisements that Negroes were not welcome (D. 19; B. 17).

Upon reaching the locked doors, petitioner Davis sat down outside the restaurant (D. 15). Mr. Davis took hold of her shoulder and moved her away from the door (D. 16), and asked petitioners to leave his grounds (B. 16).

Petitioners were neatly dressed and did not block white patrons from entering the restaurant (D. 20, 22; B. 21, 24). Mr. Davis "would open the front door and lock it, admitting white patrons, while the defendant was outside" (B. 21), and wanted petitioners to leave his grounds solely because they were Negro.

> "She was neatly dressed and the only reason I asked her to leave was that she was colored" (D. 18).

Mr. Davis decided to "indict" them for trespass (B. 22), and officers, who were "well aware of [the] policy of not serving Negroes" (D. 22), arrived and arrested petitioners for "trespass" because they refused to leave the property (D. 20, 21, 22; B. 24). The officers testified that petitioner Davis was not doing anything except sitting on a planter (D. 23), and Blow was only standing by the planter, several feet from the door (B. 23). One arresting officer had in the past arrested a white man at the restaurant for disorderly conduct, but no white person has ever been arrested on the charge of trespass at the restaurant (D. 22, 23).

Petitioners waived preliminary hearings in the Mayor's Court and the County Solicitor waived hearing in the

County Recorder's Court. The petitioners were tried separately before juries in the Superior Court of Halifax County (D. 14, 15; B. 14, 15). Petitioners (after raising constitutional defenses discussed, *infra*, pp. 6-7), were convicted of trespass under North Carolina General Statutes §14-134 and sentenced to twelve months in jail, the sentence suspended on the condition they pay the costs, pay a fine of $250, and violate no laws for a period of three years (D. 12; B. 12). The Supreme Court of North Carolina affirmed petitioners' convictions on March 18, 1964 (*infra*, pp. 1a, 7a).

How the Federal Questions Were Raised and Decided Below

In the Superior Court of Halifax County, petitioners moved for judgment as of nonsuit after the reading of the indictment. In summary petitioners contended North Carolina General Statutes §14-134 violated the United States Constitution as applied to them because:

1) The Fourteenth Amendment prevents a state from using its criminal law a) to enforce the racially discriminatory practices of a private restaurant owner once that owner has opened his property to the general public, b) to inhibit the exercise of free speech in a place opened to the public at large.

2) The Fourteenth Amendment and Article 1, Section 10 of the United States Constitution prevent interpreting a statute to include conduct which clearly falls outside the wording of a statute. Such application makes the statute unconstitutionally vague in failing to give fair warning that conduct is criminal within the terms of the statute and amounts to retroactive legislation.

3) The statute delegates legislative power and the power to cause arbitrary and capricious arrests of a person in violation of the Fourteenth Amendment.

4) Petitioner is denied the right to contract and the benefits therefrom as guaranteed by the Fourteenth Amendment and 42 U. S. C. §§1981, 1982.

5) Failure of the state court to apply N. C. Gen. Stat. §72-1, "The Innkeepers Rule," which establishes standards of practice for innkeepers, was a violation of the Fourteenth Amendment.

The motions for judgment as of nonsuit were denied (D. 3-11; B. 3-11). Petitioners pleaded not guilty and were tried before a jury (B. 11; D. 11).

Following the State's case, each petitioner again moved for judgment as of nonsuit. The motions were denied and exceptions taken (D. 23; B. 25). Petitioners offered no evidence but again submitted written motions for judgment as of nonsuit which were denied and exceptions taken (D. 24; B. 25).

After a guilty verdict, each defendant moved to set the verdict aside reiterating the contentions set out in the motions for judgment as of nonsuit. These new motions were denied and exceptions taken (D. 31; B. 34). Defendants also moved for new trials alleging errors in the progress of the trial. Motions were denied and exceptions taken (D. 31; B. 34).

As assignments of error on appeal to the Supreme Court of North Carolina, petitioners raised the questions presented in the motions for judgment as of nonsuit and assigned that these motions were erroneously denied (D. 31-34; B. 34-38).

The Supreme Court of North Carolina explicitly rejected petitioner Davis' constitutional objections, *infra*, pp. 1a-6a, holding:

> that where a person without permission or invitation enters upon the premises of another, and after entry thereon his presence is discovered and he is unconditionally ordered to leave the premises by one in the legal possession thereof, if he refuses to leave and remains on the premises, he is a trespasser from the beginning. . . . We further hold that the provisions of G. S. 14-134 do not conflict with Article 1, Section 17 of the Constitution of North Carolina or with the Privileges and Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

Petitioner Blow's conviction was affirmed *per curiam* on the basis of the Davis opinion, *infra*, pp. 7a-8a.

Reasons for Granting the Writ

This case involves substantial questions affecting important constitutional rights, resolved by the court below in conflict with principles expressed by this Court.

I.

The State of North Carolina Has Encouraged and Enforced Racial Discrimination in Violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

A. *Administrative regulations issued by the State Board of Health regarding the segregation of bathroom facilities in restaurants involve the State in the discrimination practiced in these cases.*

Administrative action in the nature of regulations dealing with the maintenance of toilet facilities in restaurants has been in effect in North Carolina at all times pertinent to this case. Restaurants in North Carolina cannot operate without attaining the minimum grade of C in accordance with tests regulated by the State Board of Health. In particular, N. C. Gen. Stat. §72-46 provides:

> *State Board of Health to regulate sanitary conditions of hotels, cafes, etc.*—For the better protection of the public health, the State Board of Health is hereby authorized, empowered and directed to prepare and enforce rules and regulations governing the sanitation of any . . . restaurant . . . The State Board of Health is also authorized, empowered and directed to
>
> (1) Require that a permit be obtained from said Board before such places begin operation, said permit to be issued only when the establishment complies with the rules and regulations authorized hereunder, and
>
> (2) To prepare a system of grading all such places as Grade A, Grade B and Grade C.
>
> No establishment shall operate which does not receive the permit required by this section and the mini-

> mum grade of C in accordance with the rules and regulations of the State Board of Health. The rules and regulations shall cover such matters as . . . lavatory facilities . . .

Under this authorization, the State Board of Health administers an inspection form on the basis of 1000 points which provides in the relevant passage:

> 6. TOILET FACILITIES: Approved facilities and approved disposal 90* (facilities adequate for each sex and race 10* . . .) (Form No. 451, revised July 1958, Law, Rules and Regulations Governing the Sanitation of Restaurant and Other Foodhandling Establishments, prepared by the North Carolina State Board of Health Sanitary Engineering Division, at pp. 26-27.[5]

In addition to the relevancy of these regulations in the licensing process, statutes provide for the continued inspection of operating establishments on the basis of the same test.

> N. C. Gen. Stat. §72-47.—*Inspections; report and grade card.* The officers, sanitarians or agents of the State Board of Health are hereby empowered and authorized to enter any . . . restaurant . . . It shall be the duty of the sanitarian or agent of the State Board of Health to leave with the management, or person in charge at the time of the inspection, a copy of his inspection and a grade card showing the grade of such place, and it shall be the duty of the management, or person in charge to post said card in a conspicuous

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[5] The entire test form is set out *infra*, pp. 20a-22a. * stands for points.

> place designated by the sanitarian where it may be readily observed by the public.

Violations of these provisions are punishable by fine and imprisonment, N. C. Gen. Stat. §72-48, and the State Health Director can sue to enjoin the operation of a restaurant which does not meet minimum standards. N. C. Gen. Stat. §72-48-1. See also, *Equal Protection of the Laws of North Carolina*, Report of the North Carolina Committee to the United States Commission on Civil Rights (1962), p. 220.

Recently in *Robinson* v. *Florida*, —— U. S. ——, 12 L. Ed. 2d 771, involving several Negro persons who remained in a restaurant after being asked to leave, this Court reversed the conviction in light of a regulation requiring separate toilet facilities in restaurants. The Court held,

> While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together. Of course, state action, of the kind that falls within the proscription of the Equal Protection Clause of the Fourteenth Amendment, may be brought about through the State's administrative and regulatory agencies, just as through its legislature. Cf. *Lombard* v. *Louisiana, supra*, 373 U. S. at 273. Here, as in Peterson v. City of Greenville, supra, we conclude that the State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment (at 773, 774).

On the same day, this Court vacated the judgment in a restaurant demonstration case coming from North Caro-

lina, *Fox, et al.* v. *North Carolina,* —— U. S. ——, 12 L. Ed. 2d 1032, after the North Carolina regulation discussed above had been brought to its attention. In a *per curiam* opinion, the Court vacated the judgment in light of *Robinson* v. *Florida, supra;* see also *Williams* v. *North Carolina,* —— U. S. ——, 12 L. Ed. 2d 1032. *Fox, et al.* v. *North Carolina,* therefore, requires that, at the least, the judgments of the North Carolina Supreme Court in these cases be vacated.

In addition to the clear State involvement in light of *Fox* and *Robinson,* the State of North Carolina has become involved in the racial discrimination practiced in these cases by denying Negroes guarantees of service at inns afforded white persons. North Carolina statutory law confers upon an innkeeper the duty of service.

> N. C. Gen. Stat. §72-1—*Must furnish accommodations* —Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel.

In the common law tradition, the innkeeper must accept all wayfarers,

> . . . unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house . . . *State* v. *Steele,* 106 N. C. 766, 11 S. E. 478 (1890).

The laws of North Carolina, therefore, deny equal protection by conferring on white persons rights which are not afforded Negroes. See: *Turner* v. *Memphis,* 369 U. S. 350, 352; *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 726-727 (concurring opinion).

Mr. Davis, the complaining witness, owned both restaurant and motel. Although the trial judge excluded testimony about the interconnections of the two establishments (D. 19; B. 18, 19, 20), the record clearly states that Mr. Davis' motel and restaurant are 60 feet apart on the same lot of ground and operated together (D. 15, 16, 17, 18, 19; B. 15, 19). The Supreme Court of North Carolina rejected the argument on the grounds (1) that petitioners sought service at the restaurant and not at the motel and (2) that the motel was managed by Mrs. Davis while the restaurant was managed by Mr. Davis, *infra* at p. 5a. But the restaurant is operated to a significant extent in cooperation with the motel. Guests at the motel are encouraged to eat at the restaurant and some of them do (D. 20; B. 18). If the influence of state policy is felt in Mr. Davis' motel, that influence would reasonably extend to his operation of the restaurant. *Robinson* v. *Florida*, —— U. S. ——, 12 L. Ed. 2d 771.

B. *These convictions enforce and encourage racial discrimination in violation of the Fourteenth Amendment to the Constitution of the United States.*

This petition presents issues identical to those presented to this Court in *Barr* v. *Columbia*, —— U. S. ——, 12 L. Ed. 2d 766; *Bell* v. *Maryland*, —— U. S. ——, 12 L. Ed. 2d 822; *Bouie* v. *City of Columbia*, —— U. S. ——, 12 L. Ed. 2d 894; *Griffin* v. *Maryland*, —— U. S. ——, 12 L. Ed. 2d 754; *Robinson* v. *Florida*, —— U. S. ——, 12 L. Ed. 2d 771. Each of these state convictions was reversed on grounds other than the "state action" issue presented. The same issue is now pending decision before this court in two other cases involving convictions for trespass at places of public accommodation: *Hamm* v. *Rock Hill*, No. 2, October Term 1964, petition for cert. granted —— U. S. ——, 12 L. Ed. 2d 1042; *Lupper* v. *Arkansas*, No. 5, October Term 1964, peti-

tion for cert. granted —— U. S. ——, 12 L. Ed. 2d 1043. Where a petition for certiorari presents questions identical with, or similar to, issues already pending before this Court in another case in which certiorari has been granted, the petition is appropriate for review. Compare *Trustee of Monroe Ave. Church of Christ* v. *Perkins*, 334 U. S. 813, with *Shelley* v. *Kraemer*, 334 U. S. 1.

Petitioners' argument here is threefold. Firstly, the use of state judicial machinery in the arrest, conviction, and punishment of petitioners is an exercise of state power in the Fourteenth Amendment sense. With the utmost respect, petitioners submit that *Shelley* v. *Kraemer*, 334 U. S. 1, is applicable and cannot properly be distinguished. By this exercise of state power, the state enforces and encourages the custom and usage of racial discrimination and segregation in the state.

Second, the segregation custom has been caused, at least in part, by laws of the state of North Carolina. Laws causally affect social customs beyond the time of their invalidation or repeal and beyond the range of their enforceable scope.

Thirdly, state power is involved to a significant degree where the state has preferred the discriminator's insubstantial property claim to the petitioners' claim of equal treatment in places of public accommodations.

These cases present additional factors not heretofore considered by this Court. Since the last time these issues were presented to the Court, Congress has enacted the Civil Rights Bill of 1964, 78 Stat. 241 (discussed further with regard to its abative effect upon these convictions, *infra*, pp. 16-25). Congress has prohibited discrimination or segregation supported by "state action" in certain establishments of public accommodation. §201 provides, *inter alia*,

> §201 (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or *if discrimination or segregation by it is supported by State action*:
>
> (2) *any restaurant*, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; . . . 78 Stat. 243. (Emphasis supplied.)

"State action" in this regard is defined by Congress:

> §201 (d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof. 78 Stat. 243.

Congress has specifically considered the problem of racial discrimination in places of public accommodation as related to State action prohibited by the Fourteenth Amendment. Petitioners submit that the complexities of this problem considered most recently by this Court in the opinions in *Bell* v. *Maryland*, *supra*, show it a particularly appropriate area for Congressional guidance. See: *Fay* v. *New York*, 332 U. S. 261, 283.

II.

The Civil Rights Act of 1964 Now Secures to Petitioners the Right to the Conduct Which the State Seeks to Punish; Therefore,

A. *Under federal law, these prosecutions are abated.*

On July 2, 1964, the President signed the Civil Rights Act of 1964, 78 Stat. 241 providing, *inter alia*:

> TITLE II Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . .
>
> * * * * *
>
> (2) any restaurant . . .
>
> * * * * *
>
> (c) The operations of an establishment affect commerce within the meaning of this title if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; . . . 78 Stat. 243.

The Plantation Restaurant clearly falls within the terms of this statute. The restaurant is located on interstate highway 301 (D. 15, 18, 19; B. 15, 16, 17), and is advertised on billboards "for some distance coming into Enfield and

for some miles going out of Enfield" (D. 19). Advertisements also appear in newspapers, on the radio, and in the rooms of the adjoining motel (D. 19, 20; B. 17). This restaurant is clearly one which "offers to serve interstate travelers" under the terms of §201(C)(2), *supra*.

An independent part of §201 extends coverage to a restaurant if the "discrimination or segregation by it is supported by State action," §201(b), *supra*. This section is defined by §201(d), 78 Stat. 243:

> Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

Petitioners submit that in the case at hand, the discrimination was carried on "under color of any custom or usage required or enforced by officials of the state. . . ." The arrest, conviction, and punishment of these petitioners for their refusal to obey an order which was admittedly discriminatory and in furtherance of a policy of racial segregation (D. 17, 22; B. 21), meet the terms of the Act.

By either view of the Act's coverage, therefore, had these alleged offenses occurred after its passage, the Civil Rights Act would furnish a complete defense. §203, 78 Stat. 244 specifically provides that:

> "No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

Senator Humphrey, floor manager for the Senate, read into the record a Justice Department statement explaining §203(c).

> "This [§203(c)] plainly means that defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that state courts must entertain defenses grounded upon these provisions." Cong. Record, 88th Cong., 1st Sess. 9162-3 (May 1, 1964).

Not only the text of the Act, but all the implications of the text are matters of the federal law, completely overriding contradictory state law. *Gibbons* v. *Ogden*, 22 U. S. (9 Wheaton) 1 (1824); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173 (1942); *Sperry* v. *Florida*, 373 U. S. 379 (1963). Federal authority has therefore removed the "offense" charged in the cases at bar from the state's category of punishable crimes, and petitioners submit that federal law abates their convictions and the forthcoming punishment.

The general federal rule is that a change in the law, prospectively rendering that conduct innocent which was formerly criminal abates prosecutions which were started under the prior law. See *Bell* v. *Maryland*, —— U. S. ——, 12 L. Ed. 2d 822, 826-7, n. 2; *United States* v. *Chambers*, 291 U. S. 217 (1934); *United States* v. *Tynen*, 78 U. S. (11 Wall.) 88 (1871). Though the case has apparently never arisen, there would seem to be no reason for the nonapplication of this rule to the operation of a federal statute upon a state proceeding where the federal statute has the effect of securing the right to conduct which formerly was unlawful, and rendering unlawful the actions of the proprietor whose interests the state prosecution seeks to protect. Cf. *Bell* v. *Maryland*, *supra*, at p. 828. Indeed the gen-

eral rule is *a fortiori* in this case because the federal authority is paramount.

The only possible exception to this general rule is the first sentence of the Act of February 25, 1871, R. S. 13, now codified in 1 U. S. C. §109, 61 Stat. 635:

> *Repeal of statutes as affecting existing liabilities.*— The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. . . .

There are numerous reasons why this saving clause is inapplicable in the present case. This statute, even more limited than the one discussed by this court in the *Bell* case refers to "repeal" only. It seems inappropriate to label the effect of the Civil Rights Act upon the state trespass laws as a "repeal" or the equivalent of a repeal, *Bell* v. *Maryland, supra,* at p. 828. Also, it is very clear in the context and legislative history of the 1871 Act, that the Congress that passed it had in mind only the effect of one federal "statute" upon another, and never intended the crucial word "statute" to apply to state laws at all. It would violate normal canons of construction in criminal matters to stretch this wording to cover a problem in federal-state relations which its framers did not consider; see Million, *Expiration or Repeal of a Federal or Oregon Statute as a Bar to Prosecution for Violation Thereunder,* 24 Ore. L. Rev. 25, 31, 32 (1944).

Further considerations demand this narrow reading of the saving clause. Where Congress has established affirmative rights to conduct which previously had been labeled as

criminal, it would be strange indeed to infer an intent of Congress that states carry out punishment under the old criminal label. As said in *Bell* v. *Maryland, supra*:

> . . . The legislative policy embodied in the supervening enactments here would appear to be much more strongly opposed to that embodied in the old enactment than is usually true in the case of an "amendment" or "repeal." It would consequently seem unlikely that the legislature intended the saving clause to apply in this situation, where the result of its application would be the conviction and punishment of persons whose "crime" has been not only erased from the statute books but officially vindicated by the new enactments. A legislature that passes a public accommodations law making it unlawful to deny services on account of race probably did not desire that persons should still be prosecuted and punished for the "crime" of seeking service from a place of public accommodations which denies it on account of race. Since the language of the saving clause raises no barrier to a ruling in accordance with these policy considerations, we should hesitate long indeed before concluding that the Maryland Court of Appeals would definitely hold the saving clause applicable to save these convictions. 12 L. Ed. 2d 829.

When working within the area of its own responsibility, this court should hesitate expanding a narrowly drawn saving clause, with the result of condoning the punishment of petitioners for doing what Congress has, in one of the great legislative enactments of our time, said that it is in the national interest they be allowed to do unpunished.

Secondly, the Civil Rights Act of 1964 speaks of the rights and privileges of equal treatment in places of public

accommodation as "secured" from punishment by the Act, §203(c), *supra*. The normal dictionary meaning of the word "secured" and the legislative history of the Act go far in indicating that Congress looked towards the protection from punishment of persons who had exercised "rights," at least of a moral nature, before the passage of the Act. House Comm. on Civil Rights Act H. R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

One need not become concerned with questions of a "retroactive" application of the Civil Rights Act. The Act, when defining "discrimination . . . supported by State action, . . . " (§201(d)), *supra*, and when forbidding punishment for the exercise of secured rights §203(c), *supra*, is directed towards the elimination of State enforced segregation customs in places of public accommodation. The convictions and punishment of these petitioners, which the State of North Carolina here seeks to enforce before this Court, as the highest court in the appellate processing of these convictions, are the very actions in furtherance and perpetuation of racial discrimination against which Congress has acted.

We ask here whether this Court should avoid the directive against punishment embodied in the act and the general federal policy of abating these prosecutions by a broad reading of the saving clause. Petitioners submit that such an unprecedented, lavish, reading would be an anomaly in light of the above considerations and the fact that petitioners face punishment for conduct which Congress has declared to be in the national interest, outlawing contrary private and state concerns.

Avoidance of this anomaly would not alone be a sufficient ground for reversal if the technical grounds were shaky. They are not, they are quite solid. The supervening fed-

eral law, paramount in authority, cannot have less effect on state law than it would on federal law. The settled federal rule, absent federal statute, would produce the effect of abatement. The one "saving" statute in this context and on the basis of legislative history is quite inapplicable to save these state convictions. These considerations correspond exactly with the obvious equities of these cases, and no contrary public or private interests can now be asserted which have not been outlawed.

The settled federal rule of abatement, therefore applies to these judgments, and no statutory bar to its application exists. The judgments should be reversed on this ground and remanded for dismissal.

B. *These cases, if not reversed outright, should be remanded to the Supreme Court of North Carolina for its determination of the abative effect of the federal Civil Rights Act of 1964.*

The minimal result required in these cases by the decision in *Bell* v. *Maryland, supra,* is their remand to the state courts. In *Bell,* this Court remanded to the state court twelve trespass convictions under circumstances similar to those in the present cases, in order that the Maryland court could determine the effect of the Maryland public accommodations law enacted subsequent to state court proceedings, but while the cases were still under review. In the present cases, the Civil Rights Act of 1964 (discussed *supra* at 16-22), is the intervening statute requiring the redetermination by the North Carolina courts. Although this statute is federal, the federal law is a part of the law of each state. *Hauenstein* v. *Lynham,* 100 U. S. 483; *Testa* v. *Katt,* 330 U. S. 386. At the least, therefore, the *Bell* holding requires the remand of these cases to the Supreme Court of North Carolina.

North Carolina, like Maryland, *Bell* v. *Maryland*, *supra*, at 826, follows the universal common-law rule that when the legislature removes the condemnation from conduct which was previously deemed criminal, pending criminal proceedings are abated. In *State* v. *Williams*, 97 N. C. 455, 2 S. E. 55, 56 (1887) the North Carolina Supreme Court held:

> "The act punished must be criminal when judgment is demanded and authority to render it must still reside in the court."

That pronouncement is one of a list of similar decisions. *State* v. *Cress*, 4 Jones (49 N. C.) 421 (1857); *State* v. *Long*, 78 N. C. 571 (1878); *State* v. *Massey*, 103 N. C. 356, 9 S. E. 632 (1889).

North Carolina has two statutes which could conceivably limit the common law rule,

> N. C. Gen. Stat. §12-2. *Repeal of statute not to affect actions.*—The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute.
>
> N. C. Gen. Stat. §12-4. *Construction of amended statute.*—Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form: but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

The former statute is one even more narrowly drawn than the similar statute considered by the court in *Bell*, *supra*. The latter statute, rather than acting as a saving clause, appears to exclude liability where the basis of criminality no longer remains, see *State* v. *Massey*, *supra*,

at 633. What the Court said in *Bell, supra,* regarding the establishment of an affirmative right to previously "criminal" conduct is applicable to both statutes:

> "The absence of such terms ['amendment' and 'repeal'] from the public accommodations laws becomes more significant when it is recognized that the effect of these enactments upon the trespass statute was quite different from that of an 'amendment' or even a 'repeal' in the usual sense. These enactments do not —in the manner of an ordinary 'repeal,' even one that is substantive rather than only formal or technical— merely erase the criminal liability that had formerly attached to persons who entered or crossed over the premises of a restaurant after being notified not to because of their race; they go further and confer upon such persons an affirmative right to carry on such conduct, making it unlawful for the restaurant owner or proprietor to notify them to leave because of their race. Such a substitution of a right for a crime, and vice versa, is a possibly unique phenomenon in legislation; it thus might well be construed as falling outside the routine categories of 'amendment' and 'repeal.'" 12 L. Ed. 2d at 828.

These considerations are consistent with North Carolina law. Of those cases which have held that criminal liability is not abated by the repeal or amendment of a statute, all deal with statutes which were simply repealed and reenacted, or amended in some insubstantial way. In each case, the conduct remained a crime after the change in the law. The repeal was a mere technicality in the enactment of a new statute which proscribed the same conduct. E.g., *State* v. *Foster,* 185 N. C. 674, 116 S. E. 561 (1923); *State*

v. *Moon*, 178 N. C. 715, 100 S. E. 614 (1919); *State* v. *Broadway*, 157 N. C. 598, 72 S. E. 987 (1911); *State* v. *Perkins*, 141 N. C. 797, 53 S. E. 735 (1906); *State* v. *Putney*, 61 N. C. 543 (1866-67). The effect of the Civil Rights Act of 1964 is not so slight.

It suffices here to raise the question of the North Carolina law. If this Court does not reverse the convictions outright as a matter of federal law, the North Carolina court should be given the opportunity to decide the question of the abative effect of the Civil Rights Act of 1964 under North Carolina law. *Bell* v. *Maryland*, *supra*, at 830-831.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF NORTH CAROLINA
Spring Term, 1964
No. 147—Halifax

STATE,

v.

ELLEN MARIE DAVIS.

Appeal by defendant from Parker, *J.*, October Criminal Session 1963 of Halifax.

The defendant was tried upon a bill of indictment charging her with a violation of the provisions of GS 14-134, in that she unlawfully trespassed upon the premises of the Plantation Restaurant at Enfield, North Carolina. The restaurant is owned and operated by William R. Davis, the prosecuting witness, who also owns the Enfield Motel located about 50 feet north of the restaurant on the same side of Highway 301. The restaurant serves white people only and has a sign to that effect at the entrance thereof.

The State's evidence tends to show that the Plantation Restaurant is located about 65 feet from Highway 301 within the town limits of Enfield; that on the night of 6 August 1963 the defendant and other Negroes, approximately 35 in number, forced their way into the Plantation Restaurant through the back door and took seats at tables where white customers were being served. That around noon on 7 August 1963 the defendant, accompanied by approximately

35 other Negroes, approached the front entrance of the Plantation Restaurant, and the owner of the restaurant locked the front door. The defendant sat down on the floor mat in front of the door. The owner of the restaurant unlocked the front door and repeatedly requested the defendant and others to move away from the front door in order that his customers might enter the restaurant. He also requested them to leave the premises. Neither the defendant nor the other Negroes present paid any attention to the requests of the proprietor of the restaurant. Officers were called, and the request to the defendant and the other Negroes to leave the premises of the restaurant was again made in the presence of the officers, and upon the failure of the defendant and others to unblock the entrance to the restaurant and leave the premises, the defendant and others were arrested and charged with trespass.

The State's evidence also tends to show that on this occasion the defendant never requested service at the restaurant.

The defendant moved for judgment as of nonsuit at the close of the State's evidence. Motion denied. The defendant offered no evidence.

The jury returned a verdict of guilty as charged in the bill of indictment. From the judgment imposed, the defendant appeals, assigning error.

ATTORNEY GENERAL BRUTON; DEPUTY ATTORNEY GENERAL RALPH MOODY *for the State*

THEAOSEUS T. CLAYTON; W. O. WARNER; SAMUEL S. MITCHELL; FLOYD B. MCKISSICK *for the defendant*

DENNY, *C.J.*

The appellant assigns as error the refusal of the court below to sustain her motion for judgment as of nonsuit.

The defendant contends that GS 14-134, which in pertinent part reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor," is unconstitutional by reason of conflict with Article I, Section 17 of the Constitution of North Carolina and the Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States; that said prosecution here rests upon an unlawful exercise of legislative power by a private citizen, to wit, the prosecuting witness. In other words, the defendant contends she has the inherent right to exercise the fundamental freedom to enter upon the premises of any private business which is open to the public generally, whether she is forbidden to do so or not, and any abridgement of that right is unconstitutional.

This Court, in S. v. Clyburn, 247 NC 455, 101 SE 2d 295, speaking through Rodman, *J.*, said: "Our statutes, GS 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.

"The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely prohibited the abridgement of existing privileges by state action and secured to all citizens the equal protection of the laws. * * *

"* * * (I)t is apparent the Legislature intended to prevent the unwanted invasion of the property rights of another, S. v. Cooke, supra (246 NC 518, 98 SE 2d 885; S. v. Baker, 231 NC 136, 56 SE 2d 424. It is not the act of entering or going on the property which is condemned; it is the intent or manner in which the entry is made that makes the conduct criminal. A peaceful entry negatives liability under GS 14-126. An entry under a *bona fide* claim of right avoids criminal responsibility under GS 14-134 even though civil liability may remain. S. v. Faggart, 170 NC 737, 87 SE 197; S. v. Wells, 142 NC 590; S. v. Fisher, 109 NC 817, S. v. Crosset, 81 NC 579.

"What is the meaning of the word 'enter' as used in the statute defining criminal trespass? The word is used in GS 14-126 as well as GS 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying GS 14-126, that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. S. v. Goodson, supra (235 NC 177, 69 SE 2d 242); S. v. Fleming, 194 NC 42, 138 SE 342; S. v. Robbins, 123 NC 730; S. v. Webster, 121 NC 586; S. v. Gray, 109 NC 790; S. v. Talbot, 97 NC 494. The word 'entry' as used in each of these statutes is synonymous with the word 'trespass.' It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent. * * * "

In light of the foregoing decision and the authorities cited therein, we hold that where a person without permission or invitation enters upon the premises of another, and after entry thereon his presence is discovered and he is unconditionally ordered to leave the premises by one

in the legal possession thereof, if he refused to leave and remains on the premises, he is a trespasser from the beginning.

Likewise, "it is the law of this jurisdiction that although an entry on lands may be effected peaceably and even with permission of the owner, yet if, after going upon the premises of another, the defendant uses violent and abusive language and commits such acts as are reasonably calculated to intimidate or lead to a breach of the peace, he would be liable for trespass *civiliter* as well as *crimiliter* (S. v. Stinnett, 203 NC 829, 167 SE 63), for 'It may be, he was not at first a trespasser, but he became such as soon as he put himself in forceable opposition to the prosecutor.' " Freeman v. Acceptance Corp., 205 NC 257, 171 SE 63.

The defendant further contends that her arrest and prosecution were violative of her rights under GS 72-1, which reads as follows: "Every innkeeper shall at all times provide suitable feed, rooms, beds and bedding for strangers and travelers *whom he may accept* as guests in his inn or hotel." (Emphasis ours)

There is evidence in the record to the effect that the prosecuting witness owned the Enfield Motel; however, there is no evidence in the record tending to show that the prosecuting witness operated or managed the motel. Furthermore, there is no evidence tending to show that the defendant ever applied for lodging at the motel. Therefore, we hold that GS 72-1 has no application to the facts in this case.

We further hold that the provisions of GS 14-134 do not conflict with Article I, Section 17 of the Constitution of North Carolina or with the Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. United States v. Harris, 106 US 629, 27 L.Ed. 290.

The evidence adduced by the State in the trial below was sufficient to carry the case to the jury and to support the verdict rendered.

The motion for judgment as of nonsuit was properly overruled.

We have examined the remaining assignments of error and they present no prejudicial error.

In the trial below, we find

No Error.

IN THE

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1964

No. 148—Halifax

STATE,

v.

ROBERT BLOW.

Appeal by defendant from Parker, *J.*, October Criminal Session 1963 of Halifax.

The defendant was tried upon a bill of indictment charging him with a violation of the provisions of GS 14-134, in that he unlawfully trespassed upon the premises of the Plantation Restaurant at Enfield, North Carolina. The restaurant is owned and operated by William R. Davis, the prosecuting witness, who also owns the Enfield Motel located about 50 feet north of the restaurant on the same side of Highway 301. The restaurant serves white people only and there is a sign to that effect at the entrance thereof.

The jury returned a verdict of guilty as charged in the bill of indictment. From the judgment imposed, the defendant appeals, assigning error.

ATTORNEY GENERAL BRUTON; DEPUTY ATTORNEY GENERAL RALPH MOODY *for the State*

THEAOSEUS T. CLAYTON; W. O. WARNER; SAMUEL S. MITCHELL; FLOYD B. MCKISSICK *for the defendant*

PER CURIAM.

The State's evidence against this defendant was substantially the same as the evidence in the case of S. v. Davis, ante.

The defendant's assignments of error purport to raise the same questions raised in the above case. The trial, verdict and judgment entered in this case will be upheld on authority of the opinion in S. v. Davis, supra.

NO ERROR.

Judgment

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1964

No. 147—Halifax County

STATE,

vs.

ELLEN MARIE DAVIS.

This cause came on to be argued upon the transcript of the record from the Superior Court Halifax County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Emery B. Denny, Chief Justice, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the defendant and surety to the appeal bond, Bankers Fire and Casualty Insurance Company, do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty and 45/100 dollars ($30.45); and execution issue therefor. Certified to Superior Court this 30th day of March 1964.

ADRIAN J. NEWTON
By /s/ SARAH B. HANNER
Clerk of the Supreme Court
Sarah B. Hanner, *Deputy Clerk*

A TRUE COPY

/s/ ADRIAN J. NEWTON
Clerk Supreme Court

Judgment

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1964

No. 148—Halifax County

STATE,

vs.

ROBERT BLOW.

This cause came on to be argued upon the transcript of the record from the Superior Court Halifax County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is adjudged by the Court here that the opinion of the Court, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the defendant and surety to the appeal bond, Bankers Fire and Casualty Insurance Company, do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-One and 60/100 dollars ($31.60), and execution issue therefor. Certified to Superior Court this 30th day of March 1964.

ADRIAN J. NEWTON
By /s/ Sarah B. Hanner
Clerk of the Supreme Court
SARAH B. HANNER, *Deputy Clerk*

A TRUE COPY

/s/ ADRIAN J. NEWTON
Clerk of the Supreme Court

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

ELLEN MARIE DAVIS

Appeal docketed	17 January 1964
Case argued	25 February 1964
Opinion filed	18 March 1964
Final judgment entered	18 March 1964

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the above entitled case as the same now appear for the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 24th day of April 1964.

/s/ ADRIAN J. NEWTON
Clerk of the Supreme Court
of North Carolina

SUPREME COURT OF NORTH CAROLINA

STATE

v.

ROBERT BLOW

Appeal docketed	11 January 1964
Case argued	25 February 1964
Opinion filed	18 March 1964
Final judgment entered	18 March 1964

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the above entitled case as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 24th day of April 1964.

/s/ ADRIAN J. NEWTON
Clerk of the Supreme Court
of North Carolina

APPENDIX B

Statutory and Regulatory Provisions

Civil Rights Act of 1964, §§201-203, 78 Stat. 243, 244:

Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise cov-

ered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b); it serves or offers to serve interstate travellers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or

political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201, or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

1 U.S.C. §109, 61 Stat. 635: Repeal of statutes as affecting existing liabilities.—The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect

to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

* * * * *

North Carolina General Statutes §12-2 (1953): Repeal of statute not to affect actions.—The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute. (1830, c. 4; R.C. c. 108, s. 1; 1879, c. 163; 1881, c. 48; Code, s. 3764; Rev. s. 2830. C.S., s. 3948.)

N.C. Gen. Stat. §12-4 (1953): Construction of amended statute.—Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment. (1868-9, c. 270, s. 22; 1870-1, c. 111; Code, s. 3766; Rev., s. 2832; C.S., s. 3950.)

N.C. Gen. Stat. §14-134 (1953): Trespass on land after being forbidden.—If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days.

N.C. Gen. Stat. §72-1 (1953): Must furnish accommodations.—Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers

whom he may accept as guests in his inn or hotel. (1903, c. 563; Rev., s. 1909; C.S., s. 2249.)

N.C. Gen. Stat. §72-46 (1953): State Board of Health to regulate sanitary conditions of hotels, cafes, etc.—For the better protection of the public health, the State Board of Health is hereby authorized, empowered and directed to prepare and enforce rules and regulations governing the sanitation of any hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich manufacturing establishment, and all other establishments where food or drink is prepared, handled, and/or served for pay, or where lodging accommodations are provided. The State Board of Health is also authorized, empowered and directed to

(1) Require that a permit be obtained from said Board before such places begin operation, said permit to be issued only when the establishment complies with the rules and regulations authorized hereunder, and

(2) To prepare a system of grading all such places as Grade A, Grade B, and Grade C.

No establishment shall operate which does not receive the permit required by this section and the minimum grade of C in accordance with the rules and regulations of the State Board of Health. The rules and regulations shall cover such matters as the cleanliness of floors, walls, ceilings, storage spaces, utensils, and other facilities; adequacy of lighting, ventilation, water, lavatory facilities, food protection facilities, bactericidal treatment of eating and drinking utensils, and waste disposal; methods of food preparation, handling, storage, and serving; health of employees; and such other items and facilities as are necessary in the interest of the public health.

N.C. Gen. Stat. §72-47 (1953): Inspections; report and grade card.—The officers, sanitarians or agents of the State Board of Health are hereby empowered and authorized to enter any hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich manufacturing establishment, and all other establishments where food or drink is prepared, handled and/or served for pay, or where lodging accommodations are provided, for the purpose of making inspections, and it is hereby made the duty of every person responsible for the management or control of such hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich manufacturing establishment or other establishment to afford free access to every part of such establishment, and to render all aid and assistance necessary to enable the sanitarians or agents of the State Board of Health to make a full, thorough and complete examination thereof, but the privacy of no person shall be violated without his or her consent. It shall be the duty of the sanitarian or agent of the State Board of Health to leave with the management, or person in charge at the time of the inspection, a copy of his inspection and a grade card showing the grade of such place, and it shall be the duty of the management, or person in charge to post said card in a conspicuous place designated by the sanitarian where it may be readily observed by the public. Such grade card shall not be removed by anyone, except an authorized sanitarian or agent of the State Board of Health, or upon his instruction.

N.C. Gen. Stat. §72-48 (1953): Violation of article a misdemeanor.—Any owner, manager, agent, or person in charge of a hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich manufacturing establishment, or any other establishment where food or drink is prepared, handled and/or served for pay, or where

lodging accommodations are provided, or any other person who shall willfully obstruct, hinder or interfere with a sanitarian, agent, or officer of the State Board of Health in the proper discharge of his duty, or who shall be found guilty of violating any of the other provisions of this article, any of the rules and regulations that may be provided under this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), or imprisoned for not more than thirty days, and each day that he shall fail to comply with this article, or operate a place with a rating of less than grade C shall be a separate offense.

N.C. Gen. Stat. §72-48.1 (1953): Injunctive relief against continued violation, etc.—If any person shall violate or threaten to violate the provisions of this article or any rules and regulations adopted pursuant thereto and such violation, if continued, or such threatened violation, if committed, is or may be dangerous to the public health, or if any person shall hinder or interfere with the proper performance of duty of a sanitarian, agent or officer of the State Board of Health or of any local board of health and such hindrance or interference is or may be dangerous to the public health, the State Health Director or local health director may institute an action in the superior court of the county in which the violation, threatened violation, hindrance or interference occurred for injunctive relief against such continued violation, threatened violation, hindrance or interference, irrespective of all other remedies at law, and upon the institution of such an action, the procedure shall be in accordance with the provisions of article 37 of chapter 1 of the General Statutes.

Law Rules and Regulations Governing the Sanitation of Restaurants and Other Foodhandling Establishments, North Carolina State Board of Health Sanitary Engineering Division, *pp. 26-27.*

NORTH CAROLINA STATE BOARD OF HEALTH

INSPECTION FORM

FOR

RESTAURANTS AND FOODHANDLING ESTABLISHMENTS

_____ PERMIT_____ SCORE_____

County or City Health Department

_____

Name of Restaurant or Establishment Manager Address

Remarks: _____

_____

1. FLOORS: Tightly constructed & in good repair 10%, clean & no ragged linoleum, etc., nor obstacles to cleaning 20%; area sufficient for all operations 10* — — — — — — — 40_____
2. WALLS AND CEILINGS: Smooth material of tight construction & in good repair 10%, painted 10*, clean & free from excessive decorations 20% — — — — — — — — — — 40_____
3. DOORS AND WINDOWS: Outside openings with effective screens and self-closing doors or effective fly-repellent fans 40% — 40_____
4. LIGHTING: Illumination adequate 10*, sufficient outlets properly located 10* — — — — — — — — — — — — — — 20_____
5. VENTILATION: Ventilation adequate 10*, effective exhaust system if needed, clean & in good repair 20% — — 30_____
6. TOILET FACILITIES: Approved facilities and approved disposal 90* (facilities adequate for each sex and race 10*, comply with Building Code 5*, size 5*, patrons' toilets not entered through kitchen 10*, doors self-closing 5*, ventilation, illumination 10*, signs 5*, floors, walls, and ceilings smooth, painted, clean, and in good repair 20%, fixtures clean & in good repair 20%). (Approved privies where physically impossible to install water-carried sewerage facilities 40%) — 90_____
7. WATER SUPPLY: Municipal supply 40*, private supply (construction & operation approved according to Code, adequate for all requirements) 40* — — — — — — — — 40_____
8. DRINKING WATER FACILITIES: Cooler, fountain or dispenser of sanitary design 20* — — — — — — — — — 20_____
9. STORAGE AND HANDLING OF ICE: Ice machines, storage boxes, grinders, pans & containers clean 10*, good repair 5*, ice dispensed with scoops, block ice washed 10* — 25_____
10. LAVATORY FACILITIES: Adequate, convenient to kitchen & toilets & clean 10%, warm water with combination supply faucet 5*, good repair 5*, soap 5*, individual towels 10*, room or area clean & free from storage 10*, ventilation & illumination 5* — — — — — — — — — — — — — 50_____
11. CONSTRUCTION OF UTENSILS AND EQUIPMENT: Easily cleanable construction with no breaks, chipped enamel or corrosion 20%, no chipped or cracked dishes, rusty or bent silverware 10%, tables, shelves & counters smooth; no cracks, oil cloth or paper 10% — — — — — — — — — — — — 40_____
12. STORAGE SPACES: Clean 10*, contents neatly arranged & stored above floors 10%, no unnecessary articles 10* — — 30_____
13. (a) CLEANING OF EQUIPMENT & UTENSILS: Clean cases, fountains, bars, counters, shelves, tables, sinks, meat blocks, refrigerators, stoves, hoods, milk shakers, grinders,

etc., 40¢; clean cloths used by employees 10°; eating & drinking utensils thoroughly cleaned after each use, and cooking utensils cleaned routinely by approved methods 60¢; adequate three-compartment sink of smooth construction with adequate size drainboards attached, splash-back protection, hot & cold water piped to each vat; separate facilities for glass washing, if needed; dishwashing machine, if used, clean & provided with pre-wash facilities, and equipped with thermometers on wash & rinse lines; adequate hot water heating facilities 40¢ — — — — — — — — — — — 150_____

(b) BACTERICIDAL TREATMENT OF EATING AND DRINKING UTENSILS: Approved bactericidal treatment after cleaning; immersed 1 minute in water at 170°F., or other approved process, thermometer provided; if machines are used, equipped & operated according to NSF standards 20°, adequate booster heaters 20° — — — — — — — — 40_____

14. STORAGE & HANDLING OF UTENSILS AND EQUIPMENT: No handling of contact surfaces, stored in clean place protected from flies, splash, dust, etc., inverted or covered when practicable 20¢; single-service cups, plates, straws, trays, spoons, etc., and ice cream dippers properly stored and handled 10° — — — — — — — — — — — — 30_____

15. DISPOSAL OF WASTES: Liquid wastes disposed of in an approved manner; garbage in standard cans with tight lids, removed frequently; facilities for cleaning, cans kept clean; other trash & rubbish in suitable receptacles 50¢ — — — — 50_____

16. PROTECTION OF FOOD: (a) Perishable food stored below 50°F., or held above 143°F., as required 30¢; (b) All food clean, wholesome, free from adulteration & spoilage; highly perishable items (see Regulations) from approved sources 30¢; (c) Shellfish from approved sources, properly stored & handled (record Permit Nos.) 15°; (d) Food once served to guest not re-served 10°; (e) Food kept under cover, not stored directly in contact with ice, shelves, etc., stored above floor, all food handled in a sanitary manner, no unnecessary handling of cooked food with hands in serving, no food served to public in the kitchen, no animals, fowls, rodents, roaches, etc., flies under control, no open displays, floor cleaning only after closing or between meals by dustless methods 70 — — — — — — — — — — — — — 155_____

17. MILK AND MILK PRODUCTS: Grade "A" Pasteurized Milk Products 30, (milk served in original containers, or from approved bulk dispenser properly located & labeled (See Regulations. Check dispenser can seals) 20°, cream handled properly 10°) — — — — — — — — — — — — 80_____

18. REQUIREMENTS FOR EMPLOYEES: Clean coats and caps, or special dress, hands clean & good foodhandling practices used 30¢; Health Certificates on file, renewed annually 10° — — — — — — — — — — — — — — — 40_____

19. PREMISES: MISCELLANEOUS: Premises kept neat and clean 30¢; soiled linens, coats, aprons, etc., kept in containers 5°; restaurant not used for domestic purposes 5° — 40_____

TOTAL — — — — — — 1000

DATE_____ SIGNED_____ AGENT

N. C. STATE BOARD OF HEALTH

Form No. 451
(Rev. 7-53)

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In The

Supreme Court of the United States

October Term, 1964

No. 387

ROBERT BLOW and ELLEN MARIE DAVIS,
Petitioners,

vs.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. W. BRUTON
Attorney General of North Carolina

RALPH MOODY
Deputy Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the State of
North Carolina, Respondent.

INDEX

Opinion Below 1
Jurisdiction 1
Questions Presented 1
Constitutional and Statutory Provisions Involved 2
Argument 3
I. THE STATE'S PROSECUTIONS DID NOT DEPRIVE PETITIONERS OF ANY RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT 3
II. THE CIVIL RIGHTS ACT OF 1964 DOES NOT AFFECT OR ABATE THE CONVICTIONS IN THESE CASES 5
III. CONCLUSION 5
Respondent's Statement of the Case 3

APPENDICES

Respondent's Appendix A 7
Respondent's Appendix B 10

TABLE OF CASES

Avent v. North Carolina, 373 U.S. 375, 10 L. Ed. 2d 420, 83 S. Ct. 1311 4
Peterson v. City of Greenville, 373 U.S. 244, 10 L. Ed. 2d 323, 83 S. Ct. 1119 4
Robinson v. Florida, ... U.S. ....., 12 L. Ed. 2d 771, 84 S. Ct. 4
State v. Avent, 253 N.C. 580, 118 S.E. 2d 47 4
State v. Blow, 261 N.C. 467, 135 S.E. 2d 17 1
State v. Clyburn, 247 N.C. 455, 101 S.E. 2d 295 4
State v. Cooke, 246 N.C. 518, 98 S.E. 2d 885 4
State v. Cooke, 248 N.C. 485, 103 S.E. 2d 846 4
State v. Davis, 261 N.C. 463, 135 S.E. 2d 14 1

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States:
Fourteenth Amendment 2, 3
Federal Statutes:
Civil Rights Act of 1964 ..... 2, 3, 5
28 U.S.C. 1257 (3) 1
State Statutes:
Sec. 14-134, General Statutes of North Carolina 2
Sec. 72-1, General Statutes of North Carolina 2
Chapter 95, Art. 6, General Statutes of North Carolina 2, 3, 4
Chapter 1114, Session Laws of 1963 ..... 2, 3

In The

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ROBERT BLOW and ELLEN MARIE DAVIS,

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vs.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

The Opinions of the Supreme Court of North Carolina are reported at 261 N.C. 463, 135 S.E. 2d 14, and 261 N.C. 467, 135 S.E. 2d 17, and both opinions were filed on the 18th of March, 1964.

JURISDICTION

The Petitioners invoke the jurisdiction of this Court pursuant to Title 28, U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Were the Petitioners deprived of constitutional rights

guaranteed by the Fourteenth Amendment for trespassing upon, and refusing to leave, the property of the restaurant owner and motel owner?

2. Are the prosecutions in these two cases suspended or abated by the passage of the Civil Rights Act of 1964, where the Petitioners were convicted and judgments passed upon them prior to the passage of the Civil Rights Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States, which will not be quoted. It also involves Section 14-134 of the General Statutes, which is as follows:

> "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined or imprisoned in the discretion of the court, or both such fine and imprisonment."

It also involves Article 6 of Chapter 95 of the General Statutes, regulating separate toilets for sexes and races, which was repealed by Chapter 1114 of the Session Laws of 1963, effective June 24, 1963, and which appears in the Cumulative Supplement of the 1963 General Statutes of North Carolina in two sections, which are Section 95-48 and Section 95-49 of the Cumulative Supplement of the General Statutes, and these appear in the Appendix.

The case also involves Section 72-1 of the General Statutes of North Carolina, which is as follows:

> "Every inn shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or motel.

RESPONDENT'S STATEMENT OF THE CASE

The facts in both cases are well stated in the opinions of the Supreme Court of North Carolina, which are set forth in the Petitioners' Appendix on pp. 1 and 7a.

ARGUMENT

I.

THE STATE'S PROSECUTIONS DID NOT DEPRIVE PETITIONERS OF ANY RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT.

The Petitioners, in the first part of their argument, base their contentions on certain administrative regulations issued by the State Board of Health, which are set forth in the Petitioners' Appendix at p. 21a. Apparently, the primary portion of this regulation, as Petitioners contend, is in paragraph 6, relating to toilet facilities, which requires restaurants to furnish "facilities adequate for each sex and race."

It is not denied that North Carolina has sanitary regulations which apply to restaurants and other establishments serving food and that these establishments are inspected and graded. The Petitioners, however, have overlooked the fact that Article 6 of Chapter 95 of the General Statutes, which required separate toilet facilities for the sexes and races, has been repealed by rewriting same, according to Chapter 1114 of the Session Laws of 1963. This Article 6 of Chapter 95 appears as our Appendix A, and new Article 6 (the rewritten version) appears as Article 6 of Chapter 95 in the 1963 Cumulative Supplement of the General Statutes, which is also quoted in our Appendix A. The rewritten version makes no distinction as to races, but does as to sex, and, apparently, if the Petitioners' contentions are carried to the limits of their logic, then it is unconstitutional for us to even make a sex distinction in toilet facilities because of Section 703 of the Civil Rights Act of 1964. We point out that while the form of the administrative regulation of the

State Board of Health (Petitioners' Appendix p. 21a) has not been revised, as a matter of practice the sanitary inspectors have been issued instructions to proceed on the basis of the rewritten version of Article 6 of Chapter 95 of the General Statutes (Respondent's Appendix B).

We, therefore, are not confronted with the situation involved in AVENT vs. NORTH CAROLINA, 373 U.S. 375, 10 L. Ed. 2d 420, 83 S. Ct. 1311, which was reversed on the authority of PETERSON vs. CITY OF GREENVILLE, 373 U.S. 244, 10 L. Ed. 2d 323, 83 S. Ct. 1119, all of which was based upon the fact that there were city ordinances requiring segregation.

We are also not confronted with the ruling of this Court in ROBINSON vs. FLORIDA, ... U.S. ....., 12 L. Ed. 2d 771, 84 S. Ct. ..... We do not now have any regulation which exerts State action in the form of requiring separate toilet facilities for the races.

We are not confronted with the question of the duties of the hotel or innkeeper. In the first place, innkeeper statute of this State is permissive and has so been construed by the Supreme Court of North Carolina in the case of Petitioner Davis (Petitioners' Appendix p. 5a) and, furthermore, there is no evidence showing that the Petitioner Davis demanded that she be received as a guest in the motel.

We shall not review all the North Carolina cases as to the trespass statute for the reason that the holdings of the Supreme Court of North Carolina have been set forth in the cases of STATE vs. CLYBURN, 247 N.C. 455, 101 S.E. 2d 295; STATE vs. COOKE, 246 N.C. 518, 98 S.E. 2d 885; STATE vs. COOKE, 248 N.C. 485, 103 S.E. 2d 846; STATE v AVENT, 253 N.C. 580, 118 S.E. 2d 47.

Counsel for the petitioners have had notice for a long time that it is the interpretation of the trespassing statute by the highest court in the State that it is a violation of the law not to leave a person's premises upon demand, and that to persist

in remaining on the premises is a criminal offense. So far as we know, this Court has never declared the trespass statute of North Carolina to be invalid.

II.

THE CIVIL RIGHTS ACT OF 1964 DOES NOT AFFECT OR ABATE THE CONVICTIONS IN THESE CASES.

We do not quote the sections of the Civil Rights Act of 1964, as they appear in the Appendix to the Petitioners' Brief.

The answer to the Petitioners' arguments on this division of the case should not be of an extended nature. The fact is that the opinions of the Supreme Court of North Carolina in the case of each petitioner were filed on March 18, 1964. The Petitioners had already been convicted, judgment and sentence had been ordered and passed by the court and affirmed by the Supreme Court of North Carolina. The Civil Rights Act of 1964 was not in existence and was not signed by the President until July 2, 1964. The Supreme Court of North Carolina, therefore, did not pass upon the effect of the Civil Rights Act of 1964, and, not being in existence, it was not even before the Supreme Court of North Carolina. There is no evidence that the supplies and products used by the restaurant and motel owner moved in interstate commerce, and the only piece of evidence in support of this contention is the fact that the proprietor advertised in newspapers, on the radio and in the rooms of the adjoining motel. The Supreme Court of North Carolina had no opportunity to judge whether or not these establishments came within the purview of Section 201 of the Civil Rights Act of 1964.

III.

CONCLUSION

We submit, therefore, that under the circumstances of this

case, the Petitioners' application for writ of certiorari should be denied by this Court.

Respectfully submitted,

T. W. BRUTON
Attorney General of North Carolina

RALPH MOODY
Deputy Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the State of
North Carolina, Respondent.

Appendix A

ARTICLE 6.

Separate Toilets for Sexes and Races.

§ 95-48. *When separate toilets required; penalty.* — All persons and corporations employing males and females in any manufacturing industry, or other business employing more than two males and females in towns and cities having a population of one thousand persons or more, and where such employees are required to do indoor work chiefly, shall provide and keep in a cleanly condition separate and distinct toilet rooms for such employees, said toilets to be lettered and marked in a distinct manner, so as to furnish separate facilities for white males, white females, colored males and colored females: Provided, that the provisions of this section shall not apply to cases where toilet arrangements or facilities are furnished by said employer off the premises occupied by him. (1913, c. 83, s. 1; C. S., s. 6559.)

§ 95-49. *Location; intruding on toilets misdemeanor.* — It shall be the duty of the persons or corporations mentioned under this article to locate their toilets for males and females, white and colored, in separate parts of their buildings or grounds in buildings hereafter erected, and in those now erected all closets shall be separated by substantial walls of brick or timber, and any employee who shall willfully intrude upon or use any toilet not intended for his or her sex or color shall be guilty of a misdemeanor and upon conviction shall be fined five dollars. (1913, c. 83, s. 4; C. S., s. 6560.)

§ 95-50. *Punishment for violation of article.* — If any person, firm, or corporation refuses to comply with the provisions of this article, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 83, s. 2; 1919, c. 100, s. 12; C. S., s. 6561.)

§ 95-51. *Police in towns to enforce article.* — The police officers of any town or city shall investigate the places of business of any person or corporation employing males and females and see that the provisions of this article are put in force, and shall swear out a warrant before the mayor or other proper officer of any town or city and prosecute all persons, corporations, and managers of corporations violating any of the provisions of this article. (1913, c. 83, s. 3; C. S., s. 6562.)

§ 95-52. *Sheriff in county to enforce article.* — When any persons or corporations locate their manufacturing plant or other business outside of any city or town, the sheriff of the county shall investigate the condition of the toilets used by such manufacturing plant or business and see that the provisions of this article are complied with, and shall swear out a warrant before a justice of the peace and prosecute anyone violating the provisions of this article. (1913, c. 83, s. 5; C. S., s. 6563.)

§ 95-53. *Enforcement by Department of Labor.* — The Department of Labor shall investigate the places of business of any person or corporation employing males and females, and shall make such rules and regulations for enforcing and carrying out this article as may be necessary. (1919, c. 100, s. 7; C. S., s. 6563(a); 1931, c. 312, ss. 12, 14.)

Article 6.

Separate Toilets for Sexes.

§ 95-48. *Separate toilets required.* — In the interest of public health and in compliance with G. S. 130-160 and 143-138, adequate, well-lighted and ventilated toilet facilities plainly lettered and marked, for each sex shall be provided and maintained in a sanitary condition by all persons and corporations employing both males and females. Such toilet facilities shall be separated by full and substantial walls. (1913, c. 83, s. 1; C. S., s. 6559; 1963, c. 1114, s. 1.)

§ 95-49. *Intruding on toilets unlawful.* — It shall be unlawful, and punishable as provided in G. S. 95-50, for any employee to wilfully intrude or use any toilet not intended for his or her sex. (1913, c. 83, s. 4; C. S., s. 6560; 1963, c. 1114, s. 2.)

C
O
P
Y

Appendix B

April 20, 1964

Mr. T. W. Bivens
Director of Sanitation
Mecklenburg-Charlotte
Health Department
Charlotte, North Carolina

Dear Mr. Bivens:

Reference is made to Mr. Drye's recent conversation with Mr. Andrews regarding Item 6, Toilet Facilities, of the inspection form for restaurants and other foodhandling establishments (Form No. 451, as revised in July, 1958). A question had been raised as to the proper interpretation of the following provision on the inspection form: "facilities adequate for each sex and race".

As you know, the toilet facilities item in the restaurant sanitation regulations as revised by the State Board of Health in 1955 and 1958 did not refer to race. However, the regulations did, and do, require that toilet facilities comply with the Rules and Regulations Governing Work Places and Working Conditions of the North Carolina Department of Labor. Since these regulations did require separate facilities, the quoted wording was considered appropriate. We understand that the Labor regulations are being revised, following action of the 1963 General Assembly, and will not require separate facilities for each race.

In view of the above, we propose to delete the words "and race" when the inspection form is next revised. Until such time as the revised forms are available, sanitarians should disregard the words "and race".

Very truly yours,

/S/

J. M. Jarrett, Director
Sanitary Engineering Divisio

CC: Dr. J. W. R. Norton
Dr. Maurice Kamp
Mr. W. M. Linker, Jr.
District Sanitarians, SBH